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Abdul Aziz bin Miew Yiong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–123–05 OF 2013
ZAKARIA SAM, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
23 DECEMBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person charged for two counts of murder — Admission by accused person — Defence of accident — Whether probable — Whether trial judge correct in accepting circumstantial evidence — Whether prima facie case proved — Whether conviction and sentence safe — Penal Code s 302

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The appellant was charged in the High Court with two counts of murder, an offence under s 302 of the Penal Code ('the Code'). The appellant was employed as a security guard and the deceased persons, Mailvaganam and Gunasilan were his colleagues and they were on shift duty together. According to the prosecution the appellant alone was armed with a pump gun ('P64') at the time of the incident; the two spent shells found at the scene were confirmed by the chemist (SP2) to have been fired from P64; the appellant had confessed to his colleagues SP3, SP4 and SP6 that he had shot the two deceased; the word the appellant used was 'tertembak'; SP3 had earlier heard the sound of two gunshots with an interval of about ten minutes in between; the appellant attempted to commit suicide by placing the nozzle of the pump gun under his chin and to pull the trigger using his right toe but was dissuaded by SP3; the appellant was overheard by SP3 calling his mother by phone and telling his mother that he had shot his friends and asked for her forgiveness as she would probably not see him again; the fatal injuries inflicted on the two deceased were confirmed by the pathologist (SP5) to be gunshot wounds fired at close range; and according to SP5 the deceased Mailvaganam was shot at a distance of less than two meters while the deceased Gunasilan was shot at a distance of 1–5 meters. In the appellant's defence, he admitted causing the deceased's death but claimed that it was an accident. According to him, he had confronted Mailvaganam for an earlier incident where Mailvaganam had said to him 'Home guard poyo sudah tidur dengan senjata'. However after Mailvaganam apologised to him the matter was amicably settled and they shook hands. Then as they were having a discussion on work related matters Gunasilan snatched the pump gun from him and in the process a shot was fired in the air without hitting anyone. The appellant said he managed to wrest back the gun from Gunasilan and cocked the safety pin from 'safe' position to 'fire' position, meaning to say the gun which he had earlier cocked to 'safe' position after the

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first accidental shot was re-cocked to 'fire' position after wresting it from Gunasilan. The gun was therefore in firing mode. They then continued to chat for about ten minutes when Gunasilan again tried to snatch the gun from him. This led to a scuffle between the two and when he tried to pull away the gun from Gunasilan a shot went off, this time hitting both Mailgavanam and Gunasilan and they fell motionless to the ground. At the conclusion of the trial, the appellant was found guilty of both charges and sentenced to death. Hence, the present appeal. The appellant submitted that his defence of accident or misfortune had been rejected by the trial judge; and the evidence was purely circumstantial as there were no eye witnesses.

Held, dismissing the appeal:

(1) The evidence was overwhelming that it was the appellant who shot the two deceased to death. No other reasonable inference could be drawn from the proven facts. As for the question of intention there can be no doubt that the appellant's intention was to cause death within the meaning of s 300(a) of the Code as the shots were fired at close range and at vital parts of the body (see para 3).

(2) What the appellant told SP3, SP4 and SP6 is direct evidence that it was the appellant who shot the deceased. What better eye witness than the assailant himself. There was therefore no merit in the appellant's contention that the trial judge erred in law and on the facts in finding that a prima facie case had been made out against the appellant. By his own admission the appellant cocked the gun to 'fire' position before the two shots were fired. If indeed he had no intention to use the gun against anyone, he would have kept the safety pin to 'safe' position at all times when he was with the two deceased. That would have prevented an accidental discharge (see paras 5 & 12).

(3) To fire two shots at two different individuals at an interval of ten minutes cannot by any stretch of the imagination be an accident. The appellant's claim that a single shot hit the two deceased was inherently improbable in the circumstances. It was contradicted by the evidence of the pathologist whose expert testimony was that the deceased Mailvaganam was shot at a distance of less than two meters while Gunasilan was shot at a distance of 1–5 meters. The only reasonable inference to be drawn from this fact was that two separate shots were fired, one shot each at the deceased and not a single shot fired by accident during a scuffle as claimed by the appellant (see para 14).

(4) If indeed the appellant had shot the two deceased unintentionally he would have rushed for medical assistance. But his conduct showed otherwise. Instead of seeking medical help, he left the two deceased to die and went to see SP3, SP4 and SP6 merely to tell them that he had 'tertembak' the deceased, followed by an act which SP3 perceived to be an

attempt by the appellant to commit suicide, which turned out to be an empty threat. In any case what the appellant told the three witnesses was a self-serving statement the truth of which was subject to assessment together with the rest of the evidence (see para 15).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi untuk dua pertuduhan membunuh, satu kesalahan di bawah s 302 Kanun Keseksaan. Perayu telah diambil bekerja sebagai pengawal keselamatan dan orang-orang yang mati, Mailvaganam dan Gunasilan ialah rakan sekerjanya dan mereka sedang bekerja giliran bersama. Menurut pendakwaan perayu sahaja bersenjatakan senapang patah ('P64') pada masa kejadian; dua kelonsong peluru yang digunakan telah dijumpai di tempat kejadian disahkan oleh ahli kimia (SP2) telah ditembak daripada P64; perayu telah membuat pengakuan kepada rakan-rakan sekerjanya SP3, SP4 dan SP6 telah menembak kedua-dua si mati; perkataan yang digunakan perayu adalah 'tertembak'; SP3 sebelum itu telah mendengar bunyi dua tembakan dalam selingan masa lebih kurang sepuluh minit; perayu telah cuba membunuh diri dengan meletakkan muncung senapang patah di bawah dagunya dan menarik picu menggunakan ibu jari kaki kanannya tetapi telah dielakkan oleh SP3; SP3 telah mendengar perayu memanggil ibunya melalui telefon dan memberitahu ibunya yang dia telah menembak kawan-kawannya dan memohon kemaafan kepadanya kerana dia mungkin tidak akan berjumpanya lagi; kecederaan parah pada kedua-dua si mati disahkan oleh ahli patologi (SP5) sebagai luka tembakan jarak dekat; dan menurut SP5 si mati Mailvaganam telah ditembak pada jarak kurang daripada dua meter manakala si mati Gunasilan telah ditembak pada jarak 1–5 meter. Dalam pembelaan perayu, dia mengakui telah menyebabkan kematian si mati tetapi mendakwa ia adalah satu kemalangan. Menurutnya, dia telah dijumpa Mailvaganam dalam kejadian sebelum itu di mana Mailvaganam telah memberitahunya 'Home guard poyo sudah tidur dengan senjata'. Walau bagaimanapun selepas Mailvaganam meminta maaf kepadanya perkara itu telah diselesaikan dengan aman dan mereka berjabat tangan. Kemudian semasa mereka berbincang tentang hal berkaitan kerja Gunasilan merampas senapang patah daripadanya dan dalam proses itu satu tembakan telah dilepaskan ke udara tanpa terkena sesiapa. Perayu berkata dia berjaya merampas balik senapang itu daripada Gunasilan dan mengunci pin keselamatan dari kedudukan 'safe' kepada kedudukan 'fire', yang memberi maksud senapang yang dia sebelum ini dikunci kepada kedudukan 'safe' selepas tembakan pertama yang tidak disengajakan itu telah dikunci semula kepada kedudukan 'fire' selepas merampasnya daripada Gunasilan. Senapang itu oleh demikian berada dalam kedudukan menembak. Mereka kemudian terus bercakap untuk lebih kurang sepuluh minit apabila sekali lagi Gunasilan cuba merampas senapang itu daripadanya. Ini menyebabkan pergelutan antara kedua mereka dan apabila dia cuba menarik senapang itu daripada Gunasilan satu tembakan telah dilepaskan, kali ini terkena kedua-dua Mailvaganam dan Gunasilan dan

mereka jatuh longlai ke lantai. Di penutup perbicaraan, perayu telah didapati bersalah kerana dua pertuduhan dan dijatuhkan hukuman mati. Justeru, rayuan ini. Perayu berhujah bahawa pembelaannya tentang kemalangan atau nasib malang telah ditolak oleh hakim perbicaraan; dan keterangan adalah mengikut keadaan semata-mata kerana tiada saksi utama.

Diputuskan, menolak rayuan:

(1) Keterangan berat kepada perayu yang menembak kedua-dua si mati sehingga mati. Tiada inferens munasabah yang lain dapat dibuat daripada fakta yang dibuktikan. Berhubung persoalan tentang niat tidak diragui bahawa niat perayu adalah untuk menyebabkan kematian dalam maksud s 300(a) Kanun Keseksaan kerana tembakan-tembakan itu dilepaskan pada jarak dekat di bahagian penting badan (lihat perenggan 3).

(2) Apa yang diberitahu perayu kepada SP3, SP4 dan SP6 adalah keterangan langsung bahawa ia adalah perayu yang telah menembak si mati. Siapa saksi utama yang lebih baik daripada penyerang sendiri. Oleh itu tiada merit dalam hujah perayu bahawa hakim perbicaraan terkhilaf dari segi undang-undang dan berdasarkan fakta dalam penemuan bahawa satu kes prima facie telah dibuktikan terhadap perayu. Melalui pengakuannya sendiri perayu telah mengunci senapang itu kepada kedudukan 'fire' sebelum dua tembakan dilepaskan. Jika memang dia tiada niat untuk menggunakan senapang itu terhadap sesiapapun, dia akan membiarkan pin keselamatan itu pada kedudukan 'safe' setiap masa semasa dia bersama kedua-dua si mati. Itu mungkin dapat mengelakkan daripada tembakan tidak sengaja dilepaskan (lihat perenggan 5 & 12).

(3) Untuk melepaskan dua tembakan pada dua individu dalam selingan masa sepuluh minit tidak boleh dianggap sebagai satu kemalangan dalam pemikiran seseorang. Dakwaan perayu bahawa satu tembakan telah terkena dua si mati tidak mungkin berlaku dalam keadaan itu. Ia bercanggah dengan keterangan ahli patologi yang telah memberi keterangan pakar bahawa si mati Mailvaganam telah ditembak ada jarak kurang daripada dua meter manakala Gunasilan telah ditembak pada jarak 1–5 meter. Satu-satunya inferens munasabah yang boleh dibuat berdasarkan fakta ini adalah bahawa dua tembakan berasingan telah dilepaskan, satu tembakan kepada satu si mati dan bukan satu tembakan telah dilepaskan tanpa disengajakan semasa pergelutan sebagaimana didakwa oleh perayu (lihat perenggan 14).

(4) Jika memang perayu yang telah menembak kedua-dua si mati tanpa niat dia akan segera mendapat bantuan perubatan. Namun perilakunya menunjukkan sebaliknya. Sebalik meminta bantuan perubatan, dia telah meninggalkan kedua-dua si mati untuk mati dan pergi kepada SP3, SP4 dan SP6 dengan hanya memberitahu bahawa dia telah 'tertembak' si

mati, diikuti dengan perbuatan yang SP3 anggap sebagai percubaan oleh perayu untuk membunuh diri yang akhirnya merupakan ugutan kosong. Dalam apa-apa keadaan pun apa yang diberitahu oleh perayu kepada ketiga-tiga saksi itu adalah kenyataan untuk diri sendiri tentang kebenaran yang tertakluk kepada penilaian bersama keterangan lain (lihat perenggan 15).]]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Jayaraman & Ors v PP [1979] 2 MLJ 88; [1979] 1 LNS 36 (refd)
Mat v PP [1963] 1 MLJ 263; [1963] 1 LNS 82 (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
PP v Shariff bin Kadir [1997] MLJU 158; [1997] 5 CLJ 463, HC (refd)
R v Shimmin 1882 15 Cox CC 122 (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Udayar Alagan & Ors v PP [1962] 1 MLJ 39, CA (refd)
Wong Heng Fatt v PP [1959] 1 MLJ 20 (refd)

Legislation referred to

Evidence Act 1950 s 105
Penal Code ss 80, 300(a)

Appeal from: Criminal Trial No 45B-11 of 2011 (High Court, Shah Alam)

Muhamad Rafique bin Rashid Ali (Imran Hadzalie bin Abdul Hamid and Ahmad Hafiz bin A Bakar with him) (Elida, Imran & Partners) for the appellant.
Yusaini Amer bin Abdul Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] The appellant was charged in the High Court at Shah Alam with two counts of murder and the charges against him are as follows:

First Charge

Bahawa kamu pada 27 Ogos 2010 jam lebih kurang 5.45 pagi, di kawasan Parking Hospital Tengku Ampuan Rahimah, di dalam Daerah Klang di Negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Mailvaganam A/L Packiri (NO KP: 630611-10-6399) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Second Charge

Bahawa kamu pada 27 Ogos 2010 jam lebih kurang 5.45 pagi, di kawasan Parking Hospital Tengku Ampuan Rahimah, di dalam Daerah Klang di Negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Gunasilan A/L Sekaran (NO KP: 881229-33-5005) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] At the conclusion of the trial he was found guilty of both charges and sentenced to death. This is his appeal against the convictions. The facts which the learned trial judge accepted as accurate can be summarised as follows. The appellant was employed as a security guard by Visi LA Security Force ('LA Security') and was stationed at Hospital Tuanku Ampuan Rahimah, Klang. The deceased Mailvaganam a/l Packiri and Gunasilan a/l Sekaran were his colleagues and they were on shift duty together that fateful morning just before daybreak. The prosecution relied on the following evidence to prove its case:

(a) the appellant alone was armed with a pump gun (P64) at the time of the incident;

(b) the two spent shells found at the scene were confirmed by the chemist (SP2) to have been fired from P64;

(c) the appellant had confessed to his colleagues SP3, SP4 and SP6 that he had shot the two deceased. The word the appellant used was 'tertembak'. SP3 had earlier heard the sound of two gunshots with an interval of about ten minutes in between;

(d) the appellant attempted to commit suicide by placing the nozzle of the pump gun under his chin and to pull the trigger using his right toe but was dissuaded by SP3;

(e) the appellant was overheard by SP3 calling his mother by phone and telling his mother that he had shot his friends and asked for her forgiveness as she would probably not see him again; and

(f) the fatal injuries inflicted on the two deceased were confirmed by the pathologist (SP5) to be gunshot wounds fired at close range. According to SP5 the deceased Mailvaganam was shot at a distance of less than two meters while the deceased Gunasilan was shot at a distance of 1–5 meters.

[3] On the combined strength of the above evidence the learned trial judge found that a prima facie case had been established against the appellant. We have no reason to disagree with the learned judge as the evidence is overwhelming that it was the appellant who shot the two deceased to death. No other reasonable inference could be drawn from the proved facts. As for the question of intention there can be no doubt that the appellant's intention was

to cause death within the meaning of s 300(a) of the Penal Code as the shots were fired at close range and at vital parts of the body.

[4] The appellant's act could also possibly fall under s 300(c) of the same code as the intended injuries were sufficient in the ordinary course of nature to cause death (as found by the learned trial judge). There is no medical evidence however to confirm this fact. The evidence of the Director of LA Security (SP9) is that the pump gun had to be cocked from 'safe' position to 'fire' position before it could be fired, meaning to say if the safety pin had been kept at 'safe' position there would be no possibility of an accidental discharge.

[5] It was submitted by counsel for the appellant that the evidence is purely circumstantial as there were no eye witnesses to the incident and that therefore the evidence established must irresistibly point to one and only one conclusion, ie the guilt of the appellant (*Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; [1979] 1 LNS 36). With due respect we find no substance to the argument. What the appellant told SP3, SP4 and SP6 is direct evidence that it was the appellant who shot the deceased. What better eye witness than the assailant himself? There is therefore no merit in the appellant's contention that the learned trial judge erred in law and on the facts in finding that a prima facie case had been made out against the appellant.

[6] When called upon to state his defence the appellant chose to make an unsworn statement from the dock. His dock statement is at exh D104. In the statement he admitted causing the deceased's death but avoided culpability by claiming that it was an accident. His story is that he had confronted Mailvaganam for an earlier incident where Mailvaganam had said to him '*Home guard poyo sudah tidur dengan senjata.*' However after Mailvaganam apologised to him the matter was amicably settled and they shook hands.

[7] Then as they were having a discussion on work related matters Gunasilan snatched the pump gun from him and in the process a shot was fired in the air without hitting anyone. The appellant said he managed to wrest back the gun from Gunasilan and cocked the safety pin from 'safe' position to 'fire' position, meaning to say the gun which he had earlier cocked to 'safe' position after the first accidental shot was re-cocked to 'fire' position after wresting it from Gunasilan. The gun was therefore in firing mode.

[8] They then continued to chat for about ten minutes when Gunasilan again tried to snatch the gun from him. This led to a scuffle between the two and when he tried to pull away the gun from Gunasilan a shot went off, this time hitting both Mailgavanam and Gunasilan and they fell motionless to the ground. In other words the appellant's story is that a single shot hit the two deceased.

[9] It was the appellant's substantive right to give an unsworn statement from the dock: see *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104. However, since the statement was not made on oath and the appellant was not liable to cross-examination it was not entitled to the same weight as sworn testimony: see *Shimmin*'s case 1882 15 Cox CC 122, at p 124 cited with approval by Thompson CJ in *Udayar Alagan & Ors v Public Prosecutor* [1962] MLJ 39 and followed by the Federal Court in *Siew Yoke Meng v Public Prosecutor* [2013] 3 MLJ 630(Criminal Appeal No RJ 05–135 of 2011 per Ahmad Hj Maarop FCJ delivering the judgment of the court).

[10] Having directed himself correctly on the law pertaining to unsworn statements from the dock, the learned trial judge proceeded to carefully consider the appellant's explanation as disclosed in his dock statement. Having done so he found the appellant's explanation to be an afterthought which failed to raise any reasonable doubt in his mind as to the guilt of the appellant. He was satisfied that the prosecution's case had been proved beyond reasonable doubt.

[11] Thus the appellant's position in this appeal is that his defence of accident or misfortune had been rejected by the trial judge. To justify interference we must be convinced that the learned trial judge was plainly wrong in arriving at such conclusion. Having heard the arguments of both sides we were not convinced that the learned judge was wrong. On the contrary we were convinced that he was plainly right as it is clear from the evidence that the appellant's intention was to cause death to the deceased.

[12] By his own admission the appellant cocked the gun to 'fire' position before the two shots were fired. If indeed he had no intention to use the gun against anyone, he would have kept the safety pin to 'safe' position at all times when he was with the two deceased. That would have prevented an accidental discharge.

[13] It was contended that the appellant's explanation ought to have been accepted by the learned trial judge as it was consistent with what he told SP3, SP4 and SP6, ie that he had 'tertembak' the two deceased. According to counsel the word 'tertembak' negates the element of intention. We do not find any substance to the submission. Consistency in evidence is not always consistent with truth.

[14] It is true that the word 'tertembak' (as opposed to 'menembak') connotes lack of intention but to fire two shots at two different individuals at an interval of ten minutes cannot by any stretch of the imagination be an accident. The appellant's claim that a single shot hit the two deceased is inherently improbable in the circumstances. It is contradicted by the evidence of the pathologist (SP5) whose expert testimony is that the deceased

Mailvaganam was shot at a distance of less than two meters while Gunasilan was shot at a distance of 1–5 meters. The only reasonable inference to be drawn from this fact is that two separate shots were fired, one shot each at the deceased and not a single shot fired by accident during a scuffle as claimed by the appellant.

[15] Further, if indeed the appellant had shot the two deceased unintentionally he would have rushed for medical assistance. But his conduct showed otherwise. Instead of seeking medical help, he left the two deceased to die and went to see SP3, SP4 and SP6 merely to tell them that he had 'tertembak' the deceased, followed by an act which SP3 perceived to be an attempt by the appellant to commit suicide, which turned out to be an empty threat. In any case what the appellant told the three witnesses was a self-serving statement the truth of which was subject to assessment together with the rest of the evidence.

[16] It is necessary to emphasise that the defence put up by the appellant was a defence of accident or misfortune. This is a statutory defence under s 80 of the Penal Code which falls under Chapter IV under the heading 'GENERAL EXCEPTIONS'. As such, the appellant had a legal burden to prove on the balance of probabilities that his act was accidental. It was not enough for him to merely cast a reasonable doubt as to whether his act was accidental or otherwise. This legal burden (as opposed to evidential burden) is imposed by s 105 of the Evidence Act 1950 ('the Evidence Act') which provides as follows:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within the exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[17] A defence under s 80 of the Penal Code is a complete defence. The provision is couched in the following terms:

> Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

[18] Whether an act amounts to an accident or misfortune is a question of fact. To earn an acquittal an accused person must fulfill all the requirements of the section and the quantum of proof to discharge the burden is proof on the balance of probabilities. In the context of the present appeal, the appellant must prove the following:

(a) he did not intend to cause the death of the two deceased;

(b) in firing the shots he was doing a lawful act in a lawful manner and by lawful means; and

(c) he had exercised proper care and caution before firing at the two deceased.

[19] Proof of the above facts could only be established by the appellant giving evidence under oath and not by making an unsworn statement from the dock where the truth of his statement could not be tested by cross examination. In the absence of such evidence the court shall, in the words of s 105 of the Evidence Act 'presume the absence of those circumstances'. The lower evidential burden of merely to cast a reasonable doubt as to his guilt (*Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82) which the learned trial judge applied in this case does not avail the appellant. We shall say more on this later in this judgment.

[20] We are aware of the conflicting High Court authorities on the question whether an unsworn statement from the dock is evidence but we prefer the view that it is not, as decided by Smith J in *Wong Heng Fatt v Public Prosecutor* [1959] MLJ 20 and Hishamuddin Yunus J (as he then was) in *Public Prosecutor v Shariff bin Kadir* [1997] MLJU 158; [1997] 5 CLJ 463. Therefore, since the appellant had a legal burden to discharge and he failed to discharge that burden by failing to give evidence, he could not have succeeded in establishing his defence of accident even if the learned trial judge had directed his mind to s 105 of the Evidence Act.

[21] In dealing with the defence case, it is clear that the learned trial judge was focusing his mind on whether the appellant's dock explanation in D104 had cast a reasonable doubt in the prosecution case. This is apparent from the penultimate para 23 of his judgment where he said that the appellant's explanation failed to cast such doubt. There was no mention of s 105 of the Evidence Act nor any mention of the appellant's duty to prove his defence on the balance of probabilities.

[22] In our view this was a misdirection by way of non-direction because what the learned judge had to decide in the light of s 105 of the Evidence Act was whether the appellant had discharged his burden of proof and not whether the appellant had cast a reasonable doubt in the prosecution case.

[23] In law there is a distinction between the duty to merely cast a reasonable doubt in the prosecution case and the duty to prove a defence on the balance of probabilities. In the former case all that the accused needs to do to entitle him to an acquittal is to cast a reasonable doubt in the trial judge's mind as to his guilt: *Mat v Public Prosecutor*. He has no duty to prove or to disprove anything

whereas in the latter case affirmative admissible evidence of the facts constituting the defence must be established, failing which he will be convicted of the offence charged.

[24] However, since the learned judge's error in applying the wrong burden was an error favourable to the appellant, no miscarriage of justice had occurred. If the appellant could not succeed on the lower burden, there is no question that he could succeed on the higher burden. For all these reasons we find the convictions to be safe and we therefore dismissed the appellant's appeal against conviction and sentence.

Appeal dismissed.

Reported by Afiq Mohamad Noor